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# In the Supreme Court of the United States

**OCTOBER TERM, 1945**

## No. [redacted] 84

STATE OF OKLAHOMA,
*Petitioner,*

VERSUS

UNITED STATES CIVIL SERVICE COMMISSION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
RANDELL S. COBB,
First Assistant Attorney General,
State Capitol,
Oklahoma City, Oklahoma,
*Counsel for Petitioner.*

APRIL, 1946.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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# In the
# Supreme Court of the United States
## OCTOBER TERM, 1945

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# No.

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STATE OF OKLAHOMA,

*Petitioner,*

VERSUS

UNITED STATES CIVIL SERVICE COMMISSION,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI

**Requiring the United States Circuit Court of Appeals for the Tenth Circuit to Certify to the Supreme Court of the United States, For Its Review and Determination, the Case of State of Oklahoma v. United States Civil Service Commission;**

## AND BRIEF IN SUPPORT THEREOF

---

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner respectfully shows:

I.

**Summary Statement of the Matter Involved**

This is an action involving the Hatch Political Activity Act, 18 U.S.C.A., Sections 61 to 61-T.

The Circuit Court below affirmed a decision of the United States District Court for the Western District of Oklahoma sustaining an order of the United States Civil Service Commission holding that by reason of a violation of the Federal Hatch Political Activity Act by a State Highway Commissioner of the State of Oklahoma, France Paris, such State officer, should be removed from office. In the alternative, the order of the Civil Service Commission held that in the event France Paris was not removed from office within thirty days from the determination of the Commission on the issue of violating the appropriate Federal agency disbursing funds for highway and road purposes within Oklahoma would be directed to withhold funds ordinarily granted to the State of Oklahoma in a sum equal to twice the annual salary of France Paris.

Upon subsequent non-compliance of said removal order by the Governor of Oklahoma, the United States Civil Service Commission directed the Public Roads Administration of the Federal Government to withhold from its grants to the State of Oklahoma the sum stated.

It is with the latter penalty imposed on the sovereign State of Oklahoma that the petitioner is strongly concerned.

The State took the position before the Commission that France Paris was not guilty of pernicious political activity and therefore had not violated the Act; that if he were found guilty of such violation, its nature was such as to bring the case within the rule that trivial violations of acts are insufficient to form a basis for the drastic order of removal from office or the imposition of a penalty on the people of a State as a result of the failure of the Governor thereof to remove the officer. The State further urged the unconstitutionality of the Hatch Political Activity Act in its application to a sovereign State and attacked the interpretation placed upon the Act by the Commission as being arbitrary and unreasonable, and wholly erroneous and offensive to settled rules of statutory construction.

To acquaint this Court with the factual and legal problems involved, the following factual statement is made:

The United States Civil Service Commission filed its "Letter of Charges" against France Paris and the State of Oklahoma and the same was entered as Docket No. 122 before the United States Civil Service Commission. Said Letter of Charges charged that France Paris, member of the State Highway Commission of the State of Oklahoma, had violated Section 12(a) and Section 15 of the Hatch Political Activity Act, 18 U.S.C.A., Sections 61-L and 61-O, in that while serving as member of the State Highway Commission of the State of Oklahoma he also held the position of Chairman of the State Democratic Central Committee and took an active

part in the political management of the Democratic Party of the State of Oklahoma by assisting in the sale of tickets for a banquet known as the Oklahoma Victory Dinner held in Oklahoma City on June 14, 1943; that said Letter of Charges was filed on October 12, 1943, and the said France Paris resigned as Chairman of the State Democratic Central Committee on October 18, 1943.

France Paris, member of the State Highway Commission, and the State of Oklahoma, filed separate Amended Answers to said Letter of Charges, in substance admitting the allegations of fact contained in said Letter of Charges but denying the conclusions of law contained therein, and denying that the allegations of fact contained in said Letter of Charges constituted a violation of the Hatch Political Activity Act. The Answers also attacked the constitutionality of said Act. Said Answers specifically alleged that if the allegations of fact contained in the Letter of Charges were held to constitute a violation of the Act, and if said Act were held constitutional, that said violation was trivial and did not warrant the drastic order requiring the removal of France Paris from the office of member of the State Highway Commission or the subjection of the State of Oklahoma to any penalty as provided in the Act.

Thereafter the parties to said proceeding, the United States Civil Service Commission, France Paris, and the State of Oklahoma, entered into a Stipulation of Facts which clearly showed that France Paris was not guilty of "pernicious

political activity" against which the Hatch Political Activity Act is directed. Said Stipulation of Facts showed that during the period from January 15, 1943, when France Paris took office as member of the State Highway Commission, to October 18, 1943, when he resigned as Chairman of the State Democratic Central Committee, there was no State election and no political campaign conducted in the State of Oklahoma; that political activity in Oklahoma during said period was virtually quiescent; that ten days before assumption of his duties as member of the State Highway Commission, France Paris closed the state headquarters of the Democratic Party and turned over its affairs to the Vice-Chairman; that the only political activity during said period of time was confined to the Victory Dinner and Paris' participation in said dinner was slight, and the stipulation in no way tends to show that he had any active, coercive connection therewith, or that he had any connection with the solicitation of funds for the Democratic Party from employees of the State Highway Department. Upon learning that the United States Civil Service Commission questioned his right to hold both positions, member of the State Highway Commission and Chairman of the State Democratic Central Committee, France Paris indicated a desire to resign as Chairman of the State Democratic Central Committee and did resign as such Chairman on October 18, 1943.

On the 7th day of September, 1944, upon the aforesaid Letter of Charges, separate Amended Answers of France

Paris and the State of Oklahoma, and the Stipulation of Facts entered into by all the parties, the United States Civil Service Commission entered its order in said proceeding finding that France Paris had violated the Hatch Political Activity Act and that the violation warranted his removal from office as member of the State Highway Commission of the State of Oklahoma. Said order was concurred in by only two members of the United States Civil Service Commission, Commissioners McMillin and Flemming. President Mitchell of said Commission prepared and filed a written dissent to said order which reads as follows:

"PRESIDENT MITCHELL, dissenting:

"I cannot agree with this conclusion. The law provides that an employee shall not take any 'active' part in political management or in a political campaign. In this case, during the period with which we are concerned, there was no political campaign going on; and there is no evidence that Mr. Paris was active in political management, in the sense in which the term would ordinarily be used. On the contrary, his continuance in the office of Chairman of the State Committee was entirely negative. He had been elected some years before and had failed to resign his chairmanship when he became a member of the State Highway Commission. Apparently he had been advised by legal authority that it wasn't necessary for him to resign a position to which he had previously been elected. While that was a mistake, in this case it was one which could easily be made. In addition, in order that he might be relieved from any details that might arise as a result of a past political campaign he turned the State office over to the Vice-Chairman. Shortly thereafter the office was closed entirely, as is customary between elections.

"In our recent *Arrington case*, Docket No. 120 (Pike and Fisher Adm. Law, 31 d 3-1), the respondent had been politically active in a mild degree; but the activity had not been 'pernicious.' His removal was found not to be warranted. In many other cases, we have found that although the respondent had committed some slight violation of the statute, removal was not warranted.

"The *Caddell case* is cited in the instant Report and Order. Without elaborating upon the *Caddell case*, it may be stated that it is not on a par with the *Paris case*. Mr. Caddell held the political office of City Committeeman, and also was a candidate for City Councilman in a party primary and later in the general election—all while employed in connection with the spending of Federal money.

"By failing to resign the chairmanship, Mr. Paris violated one of the Civil Service regulations pertaining to political activity which were included in the Hatch Act. However, the violation was not one which 'warranted the removal of the officer'." (Page 38, Transcript of Record.)

The Governor of Oklahoma did not remove France Paris from the office of member of the State Highway Commission, and the United States Civil Service Commission directed the Public Roads Administration of the Federal Government to withhold from its grants to the State of Oklahoma twice the amount of the annual salary of France Paris as a member of the State Highway Commission, or $10,800.00.

As authorized by 18 U.S.C.A., Section 61-L(c), the State of Oklahoma filed its petition in the United States District Court for the Northern District of Oklahoma, praying that the order of the United States Civil Service Commission be vacated and set aside for the following reasons:

"A. Sections 12a, 12b, 12c, and 15, of the Hatch Political Activity Act, 18 U.S.C.A., Sections 61-L, Subsections (a), (b) and (c), and 61-O, are not within any of the powers delegated to Congress, by the Constitution of the United States, but purport to regulate the internal affairs of the States in violation of the Tenth Amendment to the Constitution of the United States. Particular attention is directed to 18 U.S.C.A., Section 61-L, Subsection (c) which attempts to vest in this Court the power to suspend a State Officer from his office. Further, it was never intended by the Constitution of the United States that Congress could impose penalties upon the sovereign States of the Union.

"B. The delegation of powers by said Hatch Political Activity Act to the United States Civil Service Commission and the enforcement of said Act by the United States Civil Service Commission constitute an unauthorized delegation of power. * * *

"C. If the statutes involved be constitutional the acts complained of do not constitute a violation thereof. As shown by the title of said Act of Congress the Hatch Political Activity Act was 'An Act to prevent pernicious political activities. * * *' There is no evidence of pernicious political activity in the record on the part of the said France Paris.

"D. If the Act be constitutional and the matters complained of be a violation thereof, such acts are insufficient to warrant the issuance of the removal order by the United States Civil Service Commission. The United States Civil Service Commission abused the discretion vested in it by 18 U.S.C.A., Section 61-L, Sub-section (b) when it found that the facts in this case warranted the removal of the State Officer from his office. The violation if any is too trivial to support an order of ouster from office." (Page 6, Transcript of Record.)

The United States Civil Service Commission filed an Answer denying the allegations of the Petition of the State

of Oklahoma and asserting the validity of the Hatch Political Activity Act and the order of the Commission.

The case was heard in the United States District Court on the transcript of the record before the United States Civil Service Commission, that is upon the Letter of Charges, the separate Amended Answers thereto, the Stipulation of Facts, and the Order of the Commission.

On June 18, 1945, Honorable F. E. Kennamer, United States District Judge, filed his formal Findings of Fact and Conclusions of Law and rendered judgment sustaining the order of the United States Civil Service Commission. The State of Oklahoma contends that the Findings of Fact of the District Court which appear at Pages 48 to 50 of the Transcript of Record before the Circuit Court show that the order of the United States Civil Service Commission was contrary to law, that it was arbitrary and unreasonable, and that the Commission abused its discretion in finding that the violation warranted the removal of France Paris from office or the withholding of Federal funds from the State of Oklahoma.

In the Conclusions of Law of the District Court set forth at Pages 50 to 52 of the Transcript of Record the Court stated that the Court did not agree with the majority of the Civil Service Commission with respect to the punishment inflicted; that the order requiring the State of Oklahoma to remove France Paris from office or the withholding of Federal funds from the State appeared to be unduly harsh. The Court stated

that he concurred fully in the conclusions expressed by President Mitchell of the Civil Service Commission but that the Court was powerless to change the order of the majority of the Commission.

At the time the Findings of Fact and Conclusions of Law were filed and judgment rendered the Court made some extended remarks on the case which appear at Pages 41 to 47 of the Transcript of Record. In these remarks the Court stated that he thoroughly agreed with the dissenting opinion of President Mitchell of the Civil Service Commission but that the Court was without power to revise or reverse the order of the Commission. The Court stated that if he had the power in this case he would revise the order. In other words the Court considered the order of removal arbitrary and unreasonable but held that the Court was without power in this case to give any relief against such order.

Pursuant to provisions of 18 U.S.C.A., Section 61-L(c), the State of Oklahoma perfected an appeal to the Circuit Court of Appeals, Tenth Circuit, from the judgment of the United States District Court sustaining the order of the Civil Service Commission.

On January 18, 1946, the United States Circuit Court of Appeals, Tenth Circuit, rendered its judgment affirming the judgment of the District Court and sustaining the order of the United States Civil Service Commission. The opinion of the Circuit Court appears at Page 55 of the Transcript

of Record filed herewith. It has been reported, and its citation is:

*State of Oklahoma* v. *United States Civil Service Commission*, 153 Fed.(2d) 280.

## II.

### Jurisdiction of This Court to Review the Judgment

The jurisdiction of this Court is invoked under 18 U.S.C.A., Section 61-L(c). Said section provides that the judgment and decree of the United States District Court on its review of the order of the Civil Service Commission shall be subject to review by the appropriate Circuit Court of Appeals "and the judgment and decree of such Circuit Court of Appeals shall be final, subject to review by the Supreme Court of the United States on *certiorari* or certification as provided in Sections 346 and 347 of Title 28."

The judgment of the Circuit Court of Appeals was entered on January 18, 1946. This petition for writ of *certiorari* has been filed prior to the expiration of three months from said date. 28 U.S.C.A., Section 350.

## III.

### Statement of Points Relied On by Petitioner

1. The Court erred in concluding that the Hatch Political Activity Act is constitutional and valid.

2. The judgment of the Court is erroneous in that the acts complained of were not "pernicious" and do not constitute a violation of the Hatch Political Activity Act.

3. The judgment of the Court is erroneous in that if the acts complained of are violative of the Hatch Political Activity Act, such violation because of mitigating circumstances did not warrant the drastic order requiring the removal of France Paris from office, or if not removed, the penalizing of the sovereign State of Oklahoma.

4. The Court erred in sustaining the order of the United States Civil Service Commission in that said order was arbitrary and constituted an abuse of discretion, and therefore was contrary to law.

5. The judgment of the Court is contrary to the findings of fact, is contrary to law, is unjust and constitutes a miscarriage of justice.

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## IV.

### Reasons Relied On for Allowance of the Writ

1. This is the first time the Hatch Political Activity Act as it pertains to a sovereign State has been presented to the Supreme Court of the United States for its consideration. The State contends that the Act is unconstitutional. A Circuit Court of Appeals has held the Act constitutional as applied to a State, and therefore has decided an important question of Federal law which has not been, but should be, settled by this Court. Rule 38 of the Supreme Court, Paragraph 5(b).

2. The Hatch Political Activity Act as applied to the State of Oklahoma in this case has been held by the Circuit Court of Appeals to provide that, when an appointive State

officer violates the Act the Governor of the State pursuant to an order of the Civil Service Commission shall remove the State officer from office, and that such State officer shall not be appointed to any office or employment in any State or local agency of the State within eighteen months of his removal from the State office; that in the event the Governor does not remove the State officer from office, or if removed and he is appointed to any other office or employment in any State or local agency of such State within eighteen months of his removal from office, the people of the State shall be penalized by the Federal Bureau of Public Roads withholding from the State a sum of money which otherwise would be granted to the State for the building of badly needed roads. The Circuit Court of Appeals holds that such does not infringe the sovereignty of the State, does not amount to a usurpation of power either in the form of objectionable coercion or other forbidden interference. The Court cited in support of its holding, *Massachusetts* v. *Mellon*, 262 U.S. 447; *Steward Machine Co.* v. *Davis*, 301 U.S. 548. It is insisted that these cases do not support the holding of the Court; that such does constitute a form of objectionable coercion and therefore infringes the sovereignty of the State, and that the judgment of the Circuit Court presents a case of such peculiar gravity and general importance as to justify this Court granting *certiorari* to review said judgment.

3. That the Hatch Political Activity Act does not in express language make the mere holding of a party office a

violation of the Act; that the order of the Civil Service Commission finding that the mere holding of a party office without other activity by the holder thereof, was a violation of the Act, was contrary to law; that the order of the Commission that such holding and inactivity warranted removal from State office, was too harsh, was arbitrary and constituted an abuse of discretion, and therefore was contrary to law. That the provision in the Act that the order of the Commission shall be affirmed if in accordance with the law does not prevent the Courts from finding that the order was arbitrary and therefore contrary to law. The Congress is without authority to limit the judicial review so that the Courts cannot correct a miscarriage of justice. The judgment of the Court is unjust. It sustains a penalty imposed on the people of a sovereign State on account of a technical violation of the Act by one of its officers, and because the Governor of the State has not seen fit to carry out the order of the Civil Service Commission and remove from State office the officer who violated the Act. This Court should grant the writ of *certiorari* so that the injustice that has been done may be corrected and not again visited upon the people of a soveriegn State.

## V.

### Record

Copies of the Transcript of Record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with Rule 38 of this Honorable Court.

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### PRAYER

Wherefore, the petitioner prays that a writ of *certiorari* issue to the Circuit Court of Appeals for the Tenth Circuit, requiring said Court to certify and send to this Court a full and complete Transcript of the Record and all proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 3203, *State of Oklahoma* v. *United States Civil Service Commission*, to the end that said case may be reviewed and determined by this Court, as provided by the statutes of the United States, and that the judgment of the United States Circuit Court of Appeals in said case be reversed by this Court, and for such other relief as to the Court seems proper.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
RANDELL S. COBB,
First Assistant Attorney General,
State Capitol,
Oklahoma City, Oklahoma,
*Counsel for Petitioner.*

APRIL, 1946.

# In the
# Supreme Court of the United States
## OCTOBER TERM, 1945

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# No.

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STATE OF OKLAHOMA,

*Petitioner,*

VERSUS

UNITED STATES CIVIL SERVICE COMMISSION,

*Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I.

### THE OPINION OF THE COURT BELOW

This petition prays for a review of the judgment entered on January 18, 1946, in *State of Oklahoma* v. *United States Civil Service Commission*, No. 3203 in the United States Circuit Court of Appeals for the Tenth Circuit. The opinion of the Circuit Court appears at Page 55 of the Transcript of the Record filed herewith. It has been reported and its citation is:

*State of Oklahoma* v. *United States Civil Service Commission*, 153 Fed.(2d) 280.

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## II.

## JURISDICTION

The jurisdiction of this Court is invoked under 18 U.S.C.A., Section 61-L(c). Said section is a part of the Hatch Political Activity Act and provides that the judgment and order of the Civil Service Commission shall be subject to review by the appropriate Circuit Court of Appeals, "and the judgment and decree of such Circuit Court of Appeals shall be final, subject to review by the Supreme Court of the United States on *certiorari* or certification as provided in Sections 346 and 347 of Title 28."

28 U.S.C.A., Section 347, provides in part:

> "(a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by *certiorari*, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The judgment of the Circuit Court of Appeals was entered on January 18, 1946. This petition for writ of *certiorari* has been filed prior to the expiration of three months from said date. 28 U.S.C.A., Section 350.

## III.

## STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit have already been set forth in the foregoing petition which is adopted as a part of this brief.

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## IV.

## SPECIFICATIONS OF ERRORS

1. The Court erred in concluding that the Hatch Political Activity Act is constitutional and valid.

2. The judgment of the Court is erroneous in that the acts complained of were not "pernicious" and do not constitute a violation of the Hatch Political Activity Act.

3. The judgment of the Court is erroneous in that if the acts complained of are violative of the Hatch Political Activity Act such violation because of mitigating circumstances did not warrant the drastic order requiring the removal of France Paris from office, or if not removed, penalizing of the sovereign State of Oklahoma.

4. The Court erred in sustaining the order of the United States Civil Service Commission in that said order was arbitrary and constituted an abuse of discretion, and therefore was contrary to law.

5. The judgment of the Court is contrary to the findings of fact, is contrary to law, is unjust and constitutes a miscarriage of justice.

---

## V.

## ARGUMENT

**An important question of Federal law is presented which has not been, but should be, settled by this Court.**

Paragraph 5(b) of Rule 38 of the Rules of the Supreme Court of the United States provides:

> "5. A review on writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> * * * * * *
>
> "(b) Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of Federal law, which has not been, but should be, settled by this Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

This is the first time the Hatch Political Activity Act as it pertains to a sovereign State has been presented to the Supreme Court of the United States for its consideration. The State of Oklahoma contends that the Act is unconstitutional and that it has been applied to it in an arbitrary and unlawful manner. A Circuit Court of Appeals has held the

Act constitutional and has sustained its application to the State of Oklahoma.

Therefore, a Circuit Court has decided important questions of Federal law which have not been, but should be, settled by this Court.

The Federal statutes involved are as follows:

18 U.S.C.A., Section 61-L(a), (b) and (c) provide:

"(a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this sub-section, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.

"(b) If any Federal agency charged with the duty of making any loan or grant of funds of the United States for use in any activity by any officer or employee to whom the provisions of Sub-section (a) are applicable

has reason to believe that such officer or employee has violated the provisions of such sub-section, it shall make a report with respect thereto to the United States Civil Service Commission (hereinafter referred to as the 'Commission'). Upon the receipt of any such report, or upon the receipt of any other information which seems to the Commission to warrant an investigation, the Commission shall fix a time and place for a hearing, and shall by registered mail send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee a notice setting forth a summary of the alleged violation and the time and place of such hearing. At such hearing (which shall not be earlier than ten days after the mailing of such notice) either the officer or employee or the State or local agency, or both, may appear with counsel and be heard. After such hearing, the Commission shall determine whether any violation of such sub-section has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall by registered mail notify such officer or employee and the appropriate State or local agency of such determination. If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Commission that such violation warrants his removal, or that he has been so removed and has subsequently (within a period of eighteen months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loan or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; except that in any case of such a subsequent appointment to a position in another State or local agency which receives loans or grants from any Federal agency, such order shall require the withholding of such amount from such other State

or local agency: *Provided,* That in no event shall the Commission require any amount to be withheld from any loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of such amount would jeopardize the payment of the principal or interest on such bonds or notes. Notice of any such order shall be sent by registered mail to the State or local agency from which such amount is ordered to be withheld. The Federal agency to which such order is certified shall, after such order becomes final, withhold such amount in accordance with the terms of such order. Except as provided in Sub-section (c), any determination or order of the Commission shall become final upon the expiration of thirty days after the mailing of notice of such determination or order.

"(c) Any party aggrieved by any determination or order of the Commission under Sub-section (b) may, within thirty days after the mailing of notice of such determination or order, institute proceedings for the review thereof by filing a written petition in the District Court of the United States for the district in which such officer or employee resides; but the commencement of such proceedings shall not operate as a stay of such determination or order unless (1) it is specifically so ordered by the Court, and (2) such officer or employee is suspended from his office or employment during the pendency of such proceedings. A copy of such petition shall forthwith be served upon the Commis on, and thereupon the Commission shall certify and file in the Court a transcript of the record upon which the determination or the order complained of was made. The review by the Court shall be on the record entire, including all of the evidence taken on the hearing, and shall extend to questions of fact and questions of law. If application is made to the Court for leave to adduce additional evidence, and it is shown to the satisfaction of the Court that such additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce such evidence in the hearing before

the Commission, the Court may direct such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the Court may seem proper. The Commission may modify its findings of fact or its determination or order by reason of the additional evidence so taken and shall file with the Court such modified findings, determination, or order, and any such modified findings of fact, if supported by substantial evidence, shall be conclusive. The Court shall affirm the Commission's determination or order, or its modified determination or order, if the Court determines that the same is in accordance with law. If the Court determines that any such determination or order, or modified determination or order, is not in accordance with law, the Court shall remand the proceeding to the Commission with directions either to make such determination or order as the Court shall determine to be in accordance with law or to take such further proceedings as, in the opinion of the Court, the law requires. The judgment and decree of the Court shall be final, subject to review by the appropriate Circuit Court of Appeals as in other cases, and the judgment and decree of such Circuit Court of Appeals shall be final, subject to review by the Supreme Court of the United States on *certiorari* or certification as provided in Sections 346 and 347 of Title 28. If any provision of this sub-section is held to be invalid as applied to any party with respect to any determination or order of the Commission, such determination or order shall thereupon become final and effective as to such party in the same manner as if such provision had not been enacted."

18 U.S.C.A., Section 61-L(f)(1) provides:

"(f) For the purposes of this section—

"(1) The term 'State or local agency' means the executive branch of any State, or of any municipality or other political subdivision of such State, or any agency or department thereof."

18 U.S.C.A., Section 61-O, provides:

"The provisions of this sub-chapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by provisions of the Civil Service Rules prohibiting such employees from taking any active part in political management or in political campaigns."

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**The Court erred in concluding that the Hatch Political Activity Act is constitutional.**

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TENTH AMENDMENT

The Hatch Political Activity Act insofar as it attempts to regulate the internal affairs of a State is an invasion of the sovereignty of the States in violation of the Constitution of the United States.

The First Amendment to the Constitution prohibits the Congress from passing any law abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble.

The Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law.

Section 2 of Article IV of the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The Ninth Amendment provides the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

It is noted that the Hatch Political Activity Act does not apply to:

> "(1) The Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil service system; (3) officers holding elective offices."

The Act applies to appointive State and municipal officials. If France Paris had been elected to the State Highway Commission instead of being appointed thereto, the Hatch Political Activity Act would not have applied to him. The classification is arbitrary and unreasonable, and therefore constitutes an unlawful discrimination.

The Act not only infringes the privileges of appointive State and municipal officers as citizens but it attempts directly and indirectly to regulate the internal affairs of the State. It not only through coercion attempts to direct the removal of State officers and employees but attempts to prohibit their appointment within eighteen months to any other State or local office or position.

18 U.S.C.A., Section 61-L(c) authorizes the Federal Court to which an appeal is taken to suspend a State officer or employee pending the appeal from the order of the Civil

Service Commission. Said section provides that the commencement of an appeal from an order of the Commission:

> " * * * shall not operate as a stay of such determination or order unless (1) it is specifically so ordered by the Court, and (2) *such officer or employee is suspended from his office or employment during the pendency of such proceedings.* * * *"*

This provision authorizing a Federal Court to suspend a State officer is offensive to every constitutional principle protecting and preserving the independence of the States.

To support our argument that the Constitution of the United States does not authorize legislation designed to work a forfeiture of State offices, it may be stated as an axiom that the United States is a government of limited, enumerated and delegated powers, and that it cannot exercise any authority not granted by the Federal Constitution, either in express words or by necessary implication. *Ashton* v. *Cameron County Water Improvement District,* 298 U.S. 513. 80 L. ed. 1309. The United States Constitution contains no authority, express or implied, for the enactment of a measure designed to effect the removal from office of State officials. It may be that the Congress could validly pass an act imposing a penalty against a State officer charged with disbursing Federal funds for participating in political activity, but such act would have to be on the theory that such officer acted as an agent of the Federal Government. Such a penalty, to be valid, must be imposed against the officer himself in the shape and form of a fine or imprisonment and not directed against holding

State office. Under Article IV, Section 4 of the United States Constitution, which guarantees to every State in the Union a republican form of government, it is the prerogative of a State to create and maintain its offices of government. In this sphere it is supreme and invulnerable from an invasion of these powers by the United States.

Under the Tenth Amendment to the Federal Constitution it is provided:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Cummings* v. *Missouri*, 4 Wall.(U.S.) 277, 18 L. ed. 356, it is held that the right to determine the qualifications for State office is a power reserved to the States.

The Hatch Political Activity Act, as a penalty for violation of its terms, directs the removal of offending State officers and, as an alternative, requires Federal agencies to withhold certain grants to States failing to comply with the removal orders of the Civil Service Commission. If such orders of removal are acquiesced in by the appointing authorities of the State, there results a loss of separate and independent autonomy to the States in violation of the Constitution. It has been said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. 11 Am. Jur. 866, Sec. 171; *Texas* v. *White*, 7 Wall. 700.

In *Ashton* v. *Cameron Water Improvement District*, 298 U.S. 513, 80 L. ed. 1309, it is said:

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. *United States* v. *Butler*, 297 U.S. 1. The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation."

Under this latter decision, it is extremely doubtful if a State could enact valid legislation designed to permit such State to accept the provisions of the Hatch Political Activity Act, which relate to removal from State office, or disqualification of the person so removed to appointment to another office or employment.

Petitioner contends that the Act under consideration, insofar as it attempts to regulate the internal affairs of a State and usurp a purely State function, violates the dual system of government theory underlying the Federal Constitution. It inquires into activities of officers appointed to perform sovereign functions of the States and demands their removal from State office if its terms are violated. To coerce and gain this result, it provides that should the appointing power of a State refuse to remove an alleged offender, certain Federal grants and loans to such State will be withheld.

It has been held in numerous cases that the two governments, national and State, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 75 L. ed. 400.

If the Act be valid in attempting to regulate the qualifications for holding State office, then it must be assumed that similar State legislation affecting Federal office holders would be proper. Let us assume that the State enacts a measure which provides that upon a violation of a State regulation a postmaster or other Federal officer should be removed from office and for a failure on the part of the Federal Government to comply with the removal order a penalty is exacted from the United States.

We think it is absurd to suppose that such a measure would be within the power of the State. If it is not within the power of a State, then by the same token the Hatch Political Activity Act insofar as it affects State offices is not within the power of the Federal Government.

If the Congress may validly impose a penalty against a State office holder for participation in political activities while handling Federal funds, such penalty should be in the form of a fine or imprisonment and not forfeiture of State office, or ineligibility to be appointed to another office.

If legislation of the kind under attack be valid, there is nothing to prevent the Congress from enacting laws providing that should a State officer or employee file a fraudulent income tax return or fail to file any return at all that he shall be removed from his State office or position and in the event he is not removed the Federal Government shall withhold loans and grants to such State.

Petitioner contends that the provision relating to removal from State office and the inhibition against appoint-

ment within eighteen months thereafter to any other State or local office in the State is unconstitutional and void as an attempt to arrogate to the Federal Government powers undeniably reserved to the States under the United States Constitution. Further, Congress is without authority to confer upon Federal Courts the power to suspend State officers and employees from their offices and positions pending appeals.

To coerce the States into compliance with removal orders, the Act provides that should such removals be not made, or if made and the officer within eighteen months is appointed to any other State or local office or position in such State, an amount equal to two years' salary of the offending State officer shall be withheld from Federal grants to the State. It may be argued that the sum so withheld is negligible in amount and does not work a hardship upon the States. But infinitesimal as the amount may be, if it is valid to make this exaction it is also valid to withhold the entire grant from the State.

Under the separate government theory of the United States Constitution, such a penalty against a State is void and violative of the principle that the States and the Federal Government are dual sovereignties and may not transcend their respective spheres and embarrass and hinder the functions of the other.

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INVALID DELEGATION OF POWER

The delegation of powers by the Hatch Political Activity Act to the United States Civil Service Commission and the

enforcement of the Act by said Commission constitute an unlawful delegation of power.

This Act violates the tripartite system of government established by the Constitution of the United States.

The Hatch Political Activity Act itself does not make the mere holding of a party office a violation of the Act. See 18 U.S.C.A., Sections 61-L(a) and 61-O. The United States Civil Service Commission has promulgated a rule (Rule 1), prohibiting persons under this Act from taking an "active part in political management or in political campaigns." Heretofore the Commission has made an interpretation that "service on or for any political committee or similar organization is prohibited." In this case the Commission decides that the mere holding of the party office without any other activity or service is a violation. Thus the Commission *makes* the law, *administers* the law, and *construes* the law, and its judgment or order although conceded by the District Court to be unjust has been sustained by the Circuit Court of Appeals.

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**The judgment of the Circuit Court presents a case of such peculiar gravity and general importance as to justify this Court in granting certiorari to review said judgment.**

This Court will grant *certiorari* to review a decision involving a Federal question of substance not theretofore determined by the Supreme Court. *Brooklyn Savings Bank* v. *O'Neil*, 65 Sup. Ct. 357, 89 L. ed. 876.

Jurisdiction to review by *certiorari* should be exercised in cases of peculiar gravity and general importance. We believe this case falls within that category. See Note 6, to 28 U.S.C.A., Section 247.

The Hatch Political Activity Act as applied to the State of Oklahoma in this case has been held by the Circuit Court of Appeals to provide that when an appointive State officer violates the Act the Governor of the the State pursuant to an order of the Civil Service Commission shall remove the State officer from office, and that such State officer shall not be appointed to any office or employment in any State or local agency of the State within eighteen months of his removal from the State office; that in the event the Governor does not remove the State officer from office, or if removed and he is appointed to any other office or employment in any State or local agency of such State within eighteen months of his removal from office, the people of the State shall be penalized by the Federal Bureau of Public Roads withholding from the State a sum of money which otherwise would be granted to the State for the building of badly needed roads.

The Circuit Court of Appeals holds that such does not infringe the sovereignty of the State, does not amount to a usurpation of power either in the form of objectionable coercion or other forbidden interference. The Court cited in support of its holding *Massachusetts* v. *Mellon;* 262 U.S. 447; *Steward Machine Co.* v. *Davis,* 301 U.S. 548.

It is insisted that these cases do not support the holding of the Court; that such does constitute a form of objection-

able coercion and therefore infringes the sovereignty of the States. Through coercion it not only attempts to direct the removal of State officers and employees from office, but attempts to prohibit their appointment within eighteen months to any other State or local office or position. The Governor might remove from office the offending State officer, and such officer then might be appointed to a local office without the knowledge or approval of the Governor, and the State would be subject to the penalty provision of the Act. This form of coercion invades the sovereignty of the States. If an appointive State officer violates a valid Federal statute, the penalty should be directed at him and not at the people of the State. To be valid the penalty to be imposed against the State officer violating the Act should be in the form of a fine or imprisonment and not directed against holding State or municipal office.

*Massachusetts* v. *Mellon, supra,* involved the Federal Maternity Act. That Act provided that Federal funds were to be expended in cooperation with State agencies, and that whenever the Federal bureau administering the Act determined the funds were not being properly expended by the States, payments to the States might be withheld. This form of coercion did not attempt to regulate who might or might not hold or be appointed to State or local office.

*Steward Machine Co.* v. *Davis, supra,* held that the Social Security Act of 1935 did not call for a surrender by the States of powers essential to their quasi-sovereign existence, by

defining the minimum criteria to which a State unemployment system must conform if it is to be operated in conjunction with and as a part of the Federal system. There the Act did not attempt to regulate who might or might not hold or be appointed to State or local office.

The Hatch Political Activity Act has been sustained in *Neustein* v. *Mitchell* (D.C., N.Y.), 52 Fed. Supp. 531, and *Stewart* v. *United States Civil Service Commission*, (D.C., N.D., Ga.), 45 Fed. Supp. 697. The theory of those cases was that the Federal Government could impose conditions upon the granting of Federal funds without infringing any constitutional right of a State officer or the State. As a general proposition it is true that the Federal Government may impose conditions upon the granting of Federal funds to States, but petitioner insists that those cases are in error when the Act, as does the Hatch Political Activity Act, attempts to direct who may and who may not hold State and local office. This Act invades the sovereignty of the States and is a usurpation of power in the form of objectionable coercion in matters strictly reserved to the States. Through coercion it attempts to regulate the internal affairs of a State and usurp a purely State function.

The Federal Government may validly withhold Federal funds when they are improperly expended, but it is an entirely different proposition to say that when a State officer expending such funds violates a Federal Act he shall be removed from office and shall be ineligible to be appointed to

any other State or local office for eighteen months, and that if he is not so removed, or if removed and appointed to another office or employment, the State shall be penalized by the withholding of Federal aid.

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**The judgment of the Court is erroneous and certiorari should be granted to correct the injustice that has been done the people of the State of Oklahoma.**

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THE ACTS COMPLAINED OF WERE NOT "PERNICIOUS" AND DO NOT CONSTITUTE A VIOLATION OF THE HATCH POLITICAL ACTIVITY ACT

(1) If the Hatch Political Activity Act be valid in its application to the removal of a State officer or the imposition of a penalty against a State, it is contended that the acts complained of on the part of France Paris did not constitute a violation of the Act for the reasons advanced herein.

The Findings of Fact show that France Paris was not guilty of "pernicious political activity." He took no active part in political management or in political campaigns during the period of time involved. The Hatch Political Activity Act is directed at officers and employees who take an active part in political management or in political campaigns. The Act originally did not apply to State officers and employees, being restricted to Federal office holders and employments. As such its title read as follows:

> "An Act to prevent *pernicious political activities*, approved August 2, 1939."

The title to the amendment of July 19, 1940 (Public Law No. 753) was:

> "An Act to extend to certain officers and employees in the several States and the District of Columbia the provisions of the Act entitled 'An Act to prevent *pernicious political activities*' approved August 2, 1939."

The Act, therefore, is directed against "pernicious political activities." That portion of the body of the Act upon which the Commission based its determination of violation in the instant case prohibits on the part of certain State officers or employees "any *active* part in political management or in political campaigns." 18 U. S. C. A., Sections 61-L(a) and 61-O.

The word "active" is susceptible of divergent constructions, and resort to the title is necessary to determine its meaning and degree. Since the word "pernicious" is contained in the title it may be reasoned that the Congress intended that "active part in political management or in political campaigns" means "pernicious politicial activity."

In *United States* v. *Fisher et al.*, 6 U.S. 385, it is said:

> "Neither party contends that the title of an Act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." Citing *United States* v. *Palmer*, 3 Wheat. 631; *Smythe* v. *Fiske*, 23 Wall. 380; *Ogden* v. *Strong*, 2 Paine 584; *Baring* v. *Erdman*, 14 Haz. Pa. Reg. 129; *United States* v. *McArdle*, 2 Sawyer 367.

(2) Petitioner further objects to the application of the Act here by reason of the indefiniteness and uncertainty in the terms of the enactment. The Commission based its holding in this case on its prior interpretation of the Hatch Political Activity Act and the Civil Service Rules that membership alone on a political committee while holding certain offices and employments in State governments *ipso facto* is a violation of the Act.

It reaches this conclusion by a devious, indefinite and uncertain process. The Commission relies on 18 U.S.C.A., Sections 61-L(a) and 61-O which provide:

> "61-L(a). No officer or employee of any State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. * * *
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> * * * * * *
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> "61-O. The provisions of this sub-chapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United

States by the provisions of the civil service rules prohibiting such employees from taking any part in political management or in political campaigns."

These sections do not of themselves prohibit membership on political committees of persons affected by the Act, but the Commission then resorts to Civil Service Rule 1:

"No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns."

This rule also makes no reference to mere membership upon a political committee, but simply prohibits an "active part in political management or in political campaigns." Having traced the Act back to such Civil Service Rule, the Commission has not yet found where membership on a political committee, without active political participation, constitutes a violation of the Hatch Political Activity Act.

Pursuing a circuitous course through the Hatch Political Activity Act itself, the Civil Service Rule, and not having found provision for a violation of this nature, it finally is forced to resort to its own *interpretation* of the rule, which is that membership on a political committee *ipso facto* violates the Hatch Political Activity Act. The indefiniteness and uncertainty thus faced by one who is endeavoring to determine whether he is violating the Act is quite beyond the limitations placed by law upon statutes creating penalties.

The Congress only adopted provisions of the Civil Service Rule and did not adopt interpretations of those rules by the Commission itself. It is fundamental that a person charged with violation of an Act should by the express provisions of the Act itself or by reference to ascertainable rules find whether he is violating the Act.

The word "active" does not mean passive, but the Civil Service Commission by its construction of Rule 1 undeniably has given it that meaning.

The Hatch Political Activity Act has been characterized as civil in nature, and the contention that proceedings thereunder are of a criminal character has been denied. *Stewart* v. *United States Civil Service Commission* (D.C., N.D., Ga.), 45 Fed. Supp. 697. But the statute does create a penalty, and certain rules concerning penalty statutes and provisions are applicable.

To extend a penal statute to a case not specifically described, the intention of the Legislature must be ascertained from the words of the Act, and not made out by conjecture as to the purpose of the lawmaker or based upon probabilities. *The Ben R.*, 134 Fed. 784. And it was said in *Securities and Exchange Commission* v. *Starmont*, 31 Fed. Supp. 264, that a "penal statute" is one that punishes and must be strictly construed in favor of, not against, one brought into court to answer to alleged infraction thereof.

The constructions and interpretations by the United States Civil Service Commission upon the Hatch Act are not

Civil Service rules which might have official recognition so far as legal bibliography is concerned, but may be found only in the reports of two commercial law publishers. Thus, a person charged with violation of the Hatch Political Activities Act by reason of mere membership upon a political committee could not find a prohibition against such membership in the Act itself. He could not find an expression thereon in the Civil Service Rules. He would, in short, be compelled to trace down such interpretations and instructions in the reports of private law publishers.

To strengthen our assertion that the violation complained of consisted only in the fact of membership on a political committee, we need only to point to the Stipulation of Facts and the Report and Order of the Commission. It was stipulated that the year 1943 was a period of virtual political quiescence, and that France Paris prior to his appointment as State Highway Commissioner voluntarily closed the State headquarters of the Democratic Party and that the same were never reopened under his supervision and direction.

*It was a passive and inactive holding of the political chairmanship of which the Commission complained.*

We have heartening concurrence on this point in the dissenting opinion of President Mitchell in this case. In his opinion he stated:

> "In this case, during the period with which we are concerned, there was no political campaign going on; and there is no evidence that Mr. Paris was *active* in political management, in the sense in which the term

would ordinarily be used. On the contrary, his continuance in the office of Chairman of the State Committee was *entirely negative.*" (Page 38, Transcript of Record.)

The *Stewart case,* relied upon to a great degree by the Commission, is not worthy of comparison to the case at bar. The opinion there clearly discloses that the acts complained of on the part of the alleged offender were disgracefully flagrant and pernicious in character. Such is not shown here.

That the Commission based its holding upon a narrow and precarious point is illustrated by the following quotation from its own Report and Order:

> "If it were required, before determining that removal from employment for Hatch Act violations is warranted, to show evil intent, or premeditated purpose to defy or violate the law, or that what the respondent did (or the State Government's placing a political leader on the Highway Commission) was unique or unusual, or that any stigma resulted, then we should not find that Mr. Paris' removal is warranted." (Page 37, Transcript of Record.)

In view of the above it is submitted that the Court erred in concluding that the acts complained of constituted a violation of the Hatch Political Activity Act.

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## THE ACTS COMPLAINED OF DID NOT WARRANT THE DRASTIC ORDER OF REMOVAL FROM OFFICE OR THE PENALIZING OF A SOVEREIGN STATE

If the Hatch Political Activity Act be valid in its application to a State officer and the State, and the acts complained of constitute a violation, it is the further assertion of the

State of Oklahoma that such technical violation was insufficient to warrant the issuance of a removal order by the Commission or the penalizing of the State if such order were not complied with by the Governor of the State.

The Act, 18 U.S.C.A., Section 61-L(b), provides that after a hearing upon the alleged violation:

> "The Commission shall determine whether any violation of such sub-section has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment * * *."

Such Congressional delegation of authority to determine whether, if a violation has occurred under the Act, it is of such a nature as to warrant issuance of a removal order, is clear evidence the legislative body contemplated that administration of the Act should be tempered by the elements of mitigating circumstances and justice. The Congress did not lay down, in harsh and unequivocal terms, the rule that *any* violation of the Act should be unaffected by considerations of mitigation and degree of offense.

It was conceded at the argument before the United States Civil Service Commission and on appeal in the District Court (see Findings of Fact) that France Paris had been advised both by the Governor of the State of Oklahoma, who is a lawyer, and by the United States District Attorney for the Western District of Oklahoma, that his dual holding of membership on the Highway Commission and Chairman of the Democratic State Central Committee did not constitute a

violation of the Hatch Political Activity Act. We quite agree with the rule that a person cannot seek immunity from the operation of a rule of law by reliance upon advice of an attorney, but we do seriously urge that this is a fact in mitigation of the offense, if any, and shows a complete absence of intent and deliberation on the part of France Paris to violate the Act.

The primary purpose of the Act is to discourage corrupt political practices by authorizing orders designed to effect the removal from public office of offenders against its terms. Although, alternatively, it directs the withholding of Federal loans and grants, compliance by the executive or appointing authority of a State with the removal order acts as an ameliorative or appeasement permitting release of funds threatened to be withheld.

Removal of a person from public office should only follow after such person has committed serious acts of intended commission or omission against the laws. It should not be had upon mere technicalities.

Public office, conferred by elective franchise of the people or by the appointing power, is not lightly to be thrust aside and destroyed, and while the State courts of Oklahoma are not committed to the common law principle that it represents a species of property, yet it has been recognized that the enjoyment of the right of election or appointment to public office will be protected by the courts as quickly and as fully as though it were property. *Christy* v. *Kingfisher*,

13 Okla. 585, 76 Pac. 135. Thus, all matters in excuse or mitigation of an alleged offense should have been given credit before the Commission entered its order directing removal of France Paris from public office or the imposition of a penalty against the State.

The record in this case is filled with instances tending to mitigate the violation, if any. For example, the period covered by the alleged offense was a time of political inactivity in Oklahoma. The commission, in its Report and Order, quoted that portion of the stipulation detailing the fact that no State or national elections were held that year and that the State headquarters of the Democratic Party were closed by France Paris prior to his appointment as member of the Highway Commission and later reopened under the supervision of the Vice-Chairman. The Commission then said:

> "This was, undoubtedly, pertinent evidence. The violation would have been more aggravated had the respondent, Paris, engaged in a period of varied and fervid political labor while serving as Highway Commissioner."

We had assumed, and reasonably so, that it was in instances of unaggravated violations, the mitigating circumstances rule should have been applied.

Further reference is made to the Stipulation of Facts in Paragraph X thereof;

> "As soon as said France Paris learned that the Civil Service Commission questioned his right and authority to serve as chairman of the Democratic State Central Committee of Oklahoma and as a member of the State Highway Commission, he indicated a desire to resign as

Chairman of the Democratic State Central Committee of Oklahoma, and did resign on October 18, 1943." (Page 15, Transcript of Record.)

Upon this point the Chief Hearing Examiner stated in his preliminary report to the Commission:

"From one point of view, the case is less aggravated than if the respondent had not resigned his political post."

The Commission itself said concerning this feature:

"The facts, previously stated, regarding the resignation from the State Central Committee, merit attention. In the first place, the date of the resignation marks the end of the violation of the Act, and the length of time a violation continues is one factor bearing upon its seriousness." (Page 34, Transcript of Record.)

And, bearing upon the element of premeditation on the part of France Paris, the Commission said:

"We do not take the position that the respondent had an actual, premeditated design to violate the Hatch Act." (Page 35, Transcript of Record.)

A consideration of the mitigating factors appearing in the record of this case, admitted by the Commission, and the adverse decision made upon the question leads us to the conclusion that the United States Civil Service Commission has developed a curious antipathy toward the Highway Departments of the several States. Perhaps this official animosity is not without foundation in some of the matters coming before the Commission. We should not, however, consider the impartial administration of justice to be served by punishing a class or group for the misdeeds of a few culprits. The

attitude of the Commission in this respect is illustrated by an excerpt appearing in its Report and Order:

> "Rather than Mr. Paris' situation being unusual, we would not be surprised if it were demonstrated that the placing of outstanding political figures in high positions in Highway Departments has been a very familiar practice in the past in many States. Knowledge of this may, indeed, have been a contributing factor to what we deem to have been Mr. Paris' insufficient attention to the requirements of the Hatch Act.
>
> "In our Report and Order entitled *In the Matter of McEachren et al.*, Docket No. 117 (a case in which we found the removal of three Highway Commissioners of another State to be warranted), we discussed at some length the topic of political activities in Highway Departments. In that document, we quoted from an enlightening exposition of the subject found in V. O. Key, Jr.'s 'The Administration of Federal Grants to States,' published under auspices of the Social Science Research Council three years before enactment of Section 12. * * *" (Page 36, Transcript of Record.)

The Commission further quoted from its finding in the *McEachren case*:

> "Mr. Sid Smyth, Director of Personnel and Purchases, with twenty-three years' official experience in the Highway Department, testified that such political activities as existed in that department prevail 'in all State institutions,' not only in Arizona, but he thought 'he would be safe in saying, throughout the United States'." (Page 37, Transcript of Record.)

The Commission interjects at this point a qualification that "generalization tends to exaggeration." It did, however, appear to attach to and impress Mr. Smyth's testimony concerning the Highway Departments of the 48 States with considerable importance.

The Supreme Court of Oklahoma, in discussing alleged violations of a trivial nature on the part of a public officer, said in *Shields* v. *State*, 184 Okla. 618, 89 Pac.(2d) 756:

> "Removal from office must rest on a more solid foundation."

The Commission takes the position that the entry of its Report and Order does not *eo instante* oust a public officer. We agree. But such Report and Order does have a coercive effect upon the State to the extent that if it does not remove the officer it is subjected to a penalty in the form of withheld Federal funds. The law is concerned only with *cause and effect.*

The "mitigating circumstance rule," for which we here contend, was applied by the Commission in the case of *In re Arrington*, Docket No. 120, March 15, 1944. That case involved a Federal Housing manager who, during continuance of his Federal employment, occupied the office of city councilman. The Commission said, in applying the rule:

> "* * * in mitigation of the offense is the nature in which accused's campaign was conducted. It is shown that his political activity consisted only of taking the necessary steps to place his name on the ballot, placing an order of advertising match folders and leaving them at party headquarters, and attending political meetings 'as a spectator' at which time he was introduced but declined to sit on the platform or take part."

In the *Arrington case*, as in the Paris case, the alleged offender was advised by legal counsel that he was not violating the Act. *The Commission held this also to be a point in mitigation.*

In that case, as here, the employee involved tendered his resignation upon learning the Commission questioned his right to hold both positions. *That fact, too, was considered in mitigation.*

President Mitchell of the Commission, in his dissenting opinion herein, recognized that the instant case was not such as warranted a removal order. He said:

> "In our recent *Arrington case*, Docket No. 120, • • • the respondent had been politically active in a mild degree; but the activity had not been 'pernicious.' His removal was found not to be warranted. In many other cases, we have found that although the respondent had committed some slight violation of the statute, removal was not warranted.
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> "By failing to resign the chairmanship, Mr. Paris violated one of the Civil Service regulations pertaining to political activity which were included in the Hatch Act. However, the violation was not one which 'warrants the removal of the officer'." (Page 39, Transcript of Record.)

We, therefore, offer the following summary in mitigation:

1. Political activity during the questioned period was virtually quiescent.
2. Ten days before the assumption of his duties as member of the State Highway Commission, France Paris closed the State headquarters of the Democratic Party, and turned over its affairs to the Vice-Chairman.
3. France Paris admittedly had no connection with solicitation of party funds.

4. He was advised by competent legal counsel that the dual holding of both positions did not violate the Hatch Act.

5. Six days after learning the Commission took the position he was violating the Act, he resigned the chairmanship of the State Central Committee of the Democratic Party.

6. Mere passive, inactive membership on a political committee is not the "active" and "pernicious" participation in political affairs that the Hatch Act is intended to prohibit.

Petitioner respectfully urges that the judgment of the Court is erroneous for the reason that the acts complained of did not warrant the drastic order of removal of France Paris from office, or in the alternative the withholding of Federal funds from the State of Oklahoma. Because of the mitigating circumstances the Civil Service Commission should not have issued the order and the Court should have so held.

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**The Court erred in sustaining the Order of the Commission in that the Order was arbitrary and constituted an abuse of discretion and therefore was contrary to law.**

Petitioner respectfully urges that under the Stipulation of Facts the Commission was not warranted in imposing the penalty in this case. There is no evidence that France Paris used his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof; or that he directly or indirectly coerced, attempted to coerce, or commanded or advised any other officer or employee to pay, lend, or contribute any part

of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. There is no evidence that he took any active part in political management or in political campaigns during the period of time involved in this case. 18 U.S.C.A., Sections 61-L(a) and 61-O.

Considering the above and the mitigating circumstances hereinbefore set forth, petitioner submits that under the facts the order of removal was arbitrary and unreasonable and constituted an abuse of discretion, and therefore was contrary to law, and the Court should have so held. Abuse of discretion constitutes error of law. See 1 Words and Phrases (Permanent Edition) 179, 182.

The Findings of Fact of the District Court which appear at Pages 48 to 50 of the Transcript of Record before the Circuit Court show that the order of the Civil Service Commission was contrary to law, that it was arbitrary and unreasonable, and that the Commission abused its discretion in finding that the violation warranted the removal of France Paris from office or the withholding of Federal funds from the State of Oklahoma.

In the Conclusions of Law of the District Court set forth at Pages 50 to 52 of the Transcript of Record the Court stated that the Court did not agree with the majority of the Civil Service Commission with respect to the punishment inflicted; that the order requiring the State of Oklahoma to remove France Paris from office or the withholding of Federal funds

from the State appeared to be unduly harsh. The Court stated that he concurred fully in the conclusions expressed by President Mitchell of the Civil Service Commission but that the Court was powerless to change the order of the majority of the Commission.

The District Judge made some extended remarks on the case which appear at Pages 41 to 47 of the Transcript of Record. He stated if he had the power he would revise the order. In other words the Court considered the order of removal arbitrary and unreasonable but held that the Court was without power to give any relief against the arbitrary action of the Commission.

The Circuit Court in its opinion concluded that the order of the Commission should be sustained because the Act provided that the order should be sustained if in accordance with the law. An arbitrary order, an order based on abuse of discretion, an order that is unduly harsh, is not in accordance with the law.

Congress is without authority to limit the judicial review so that Courts cannot correct a miscarriage of justice. See Article III, Constitution of the United States.

Reviewing Courts are especially concerned that the application of the pertinent statute has been made by the administrative body in a just and reasonable manner. 42 Am. Jur. 602. It was said in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 83 L. ed. 221, that the purpose of judicial review of an administrative order provided by statute is consonant with that of the administrative proceeding itself—to secure a just result.

The finding must not be arbitrary and capricious. *Shields* v. *Utah, Idaho Central R. Co.*, 305 U.S. 177, 185, 83 L. ed. 111.

The application of a statute by an administrative body must be in a just and reasoned manner. *Gray* v. *Powell*, 314 U.S. 402, 411.

It is respectfully urged that the order of the United States Civil Service Commission was arbitrary and unjust and constituted a miscarriage of justice. Therefore, the order was contrary to law. The judgment of the Circuit Court sustaining such order is erroneous and this Court should grant *certiorari* to correct the injustice that has been done the people of the State of Oklahoma.

## CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, by granting a writ of *certiorari* and thereafter reviewing the judgment of the United States Circuit Court of Appeals for the Tenth Circuit and reversing the same.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
RANDELL S. COBB,
First Assistant Attorney General,
State Capitol,
Oklahoma City, Oklahoma,
*Counsel for Petitioner.*

APRIL, 1946.